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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

JAMES P. LEHNERT, *et al.*,
Petitioners,

v.

THE FERRIS FACULTY
ASSOCIATION-MEA-NEA, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF FOR THE PETITIONERS

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I. AGENCY SHOPS ARE NOT EXCEPTED FROM STRICT FIRST-AMENDMENT SCRUTINY

Respondent unions cannot deny that Michigan's requirement that petitioner nonunion employees pay a fee to them as a condition of public employment—even for collective bargaining, contract administration, and grievance adjustment on behalf of their own bargaining unit—is "a significant impingement on First Amendment rights." *Ellis v. Railway Clerks*, 466 U.S. 435, 455 (1984); *accord Teachers Local 1 v. Hudson*, 475 U.S. 292, 301 n.8, 307 n.20 (1986). Rather, the unions argue that this Court permits less than first-amendment strict scrutiny, and should defer to Michigan's judgment, in defining what may constitutionally be charged to objecting nonmembers. No such exception to the traditional rule exists.

The "agency shop" inherently coerces association and speech. *See Abood v. Detroit Bd. of Educ.*, 431 U.S. 209, 222, 233-35 (1977). State action which compels speech is "content-based regulation," "subject to exacting First Amendment scrutiny" (if the speech is not purely commercial), because "[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech." *Riley v. National Fed'n of the Blind*, 487 U.S. 781, 795-98 (1988) (citing, *inter alia*, *Abood*, 431 U.S. at 234-35).

Consequently, when *Abood* addressed what activities nonmembers constitutionally may be compelled to subsidize, it gave *no* deference to Michigan's judgment, expressed in the very statute at issue here, that it served a valid state interest for public-sector exclusive bargaining agents to exact service fees "for legislative lobbying and in support of political candidates," 431 U.S. at 215. The Court recognized that there may be a connection between those activities and public-sector collective bargaining. *See id.* at 228. However, it *rejected* that connection as a basis for coercing speech. Relying on strict-scrutiny cases, *Abood* held that the first amendment prohibits a union's expenditure of dissenting nonmembers' fees "for the expression of political views, on behalf of political candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative." *Id.* at 232-36.

The adjective "germane" does not suggest "'that compelling an employee to finance any union activity that may be "related" *in some way* to collective bargaining is permissible under the First Amendment * * * ,'" Respondents' Brief at 15 n.8 (quoting *Abood*, 431 U.S. at 254 (Powell, J., concurring in the judgment)) (emphasis added). Rather, it indicates that the only activities protected by the first amendment which may constitutionally be charged to nonmembers are those which relate *directly* to the union's duties as their bargaining agent, since "germane" means "closely related." *Webster's New Twentieth Century Dictionary* 767 (2d ed. unabr. 1978); *accord Black's Law Dictionary* 816 (rev. 4th ed. 1968). That reading is reinforced by the *dictum* that "related budgetary and appropriations decisions might be seen as an integral part of the bargaining process," *Abood*, 431 U.S. at 236. To be "integral," a thing must be "necessary to make a whole." *Webster's*, *supra*, at 953.

Respondents seize on the comment in *Ellis*, 466 U.S. at 456, that the union must "have a certain flexibility in its use of compelled funds." However, *Ellis* limited that "flexibility" to activities necessarily or reasonably related to performance of the union's duties as the dissenters' bargaining agent *and* involving no or "little additional infringement of First Amendment rights beyond that already accepted" in coerced subsidization of direct costs of those duties. *See id.* at 448-51, 456; Petitioners' Brief at 9-10.

Ellis extended no "flexibility" to publications reporting on nonchargeable activities, to litigation not directly concerning the objectors' unit, or to organizing. The Court accepted the court of appeals' finding that those activities "ultimately benefited the union's collective-bargaining efforts," 466 U.S. at 441. Yet, it held them nonchargeable on statutory grounds, explaining as to organizing that such a connection to bargaining in the dissenters' unit was too "attenuated." *Id.* at 450-53. As the Brief for Amicus AFL-CIO at 29 n.19 concedes as to litigation and organizing, the result should be the same under the first amendment. Activities "with some relationship to collective bargaining" that also "implicate heightened First Amendment interests, separate from those involved in requiring support of union activity germane to collective bargaining," are "held to a stricter First Amendment standard than where the objection is simply

that it is a *union* expense." *Id.*; *see Ellis*, 466 U.S. at 461-62 (Powell, J., concurring in part). In short, *Ellis* applied exacting scrutiny to activities such as those at issue here.[1]

Respondents' Brief at 13 infers that strict scrutiny is unnecessary because *Keller v. State Bar*, 110 S. Ct. 2228, 2237 (1990), said that compulsory bar dues may not be spent on "activities having political or ideological coloration which are not reasonably related to the advancement" of "the regulation of the legal profession." *Keller* also described constitutionally chargeable activities as those "germane to," or in which the Bar is "acting essentially as professional advisors to those ultimately charged with," that regulatory function. *Id.* at 2236-37. It thus defined "reasonably related" as a *direct* relationship.[2]

Moreover, *Keller* established that the state interest to which chargeable expenses must relate is not what a state broadly

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[1] Respondents' Brief at 8 n.6 errs in asserting that only contributions to candidates are subject to strict scrutiny. The principle that governmental "'restrictions on advocacy of the election or defeat of political candidates are wholly at odds with the guarantees of the First Amendment' * * * applies equally to 'the discussion of political policy generally or advocacy of the passage or defeat of legislation.'" *Meyer v. Grant*, 486 U.S. 414, 428 (1988) (quoting *Buckley v. Valeo*, 424 U.S. 1, 48, 50 (1976)).

[2] The Court usually excepts a class of regulation from first-amendment strict scrutiny only explicitly, as it did in *Board of Trustees v. Fox*, 109 S. Ct. 3028, 3032-35 (1989) (commercial speech), cited by the AFL-CIO's Brief at 25. This case is in none of the classes described in *Fox*: the protected aspects of the speech here are inextricable from any commercial aspects; the issue is the content of the speech, not its time, place or manner; and what is compelled is speech, not mere expressive conduct. However, it is worth noting that *Fox*, 109 S. Ct. at 3035, held that the "reasonable fit" required of an infringement on speech not subject to the least-restrictive-means test is not merely that it "could be thought to further a legitimate governmental goal," but that it is "narrowly tailored to achieve" a "substantial" state goal. That the procedural safeguards in collecting service fees imposed on unions by *Hudson*, 475 U.S. at 303, are only "carefully tailored," not the most rigorous conceivable, does not prove that strict scrutiny is unnecessary here, as Respondents' Brief at 15 n.8 argues. Procedural requirements are similar to time, place, and manner regulations, but the definition of the subjects on which speech may be compelled is a *content*-based regulation. *See Riley*, 487 U.S. at 795.

asserts it to be, but the narrow interest which *this Court* identifies as sufficient to justify a compulsory fee. *See id.* at 2236. The basic flaw in the unions' argument is that, like the decisions below, it fails to recognize the limits to the governmental interests which the Court has found support the agency shop.

II. THE GOVERNMENTAL INTERESTS IN AN AGENCY SHOP IDENTIFIED BY THE COURT CONCERN THE STATUTORY BARGAINING PROCESS IN A SPECIFIC UNIT, NOT LABOR RELATIONS GENERALLY

The unions assume that the governmental interests underlying a constitutional agency shop are "labor peace" in the abstract and elimination of "free riders" on everything unions do to affect employment conditions anywhere. The only interests ever accepted by this Court, however, are much narrower.

The "desirability of labor peace" which *Abood*, 431 U.S. at 224-25, found "support[s] the impingement upon associational freedom created by the agency shop" was for "labor peace" *in making and enforcing a labor contract in a specific bargaining unit*:

> The designation of a single representative avoids the confusion that would result from attempting to enforce two or more agreements specifying different terms and conditions of employment. It prevents inter-union rivalries from creating dissension within the work force and eliminating the advantages to the employee of collectivization. It also frees the employer from the possibility of facing conflicting demands from different unions, and permits the employer and a single union to reach agreements and settlements that are not subject to attack from rival labor organizations.

Id. at 220-21; *accord id.* at 224. That language does not refer to the multi-unit scheme that the unions posit.

The "free-rider problem" this Court recognized is no less limited. The "essential justification for authorizing the union shop was the desire to eliminate free riders—employees *in the bargaining unit* on whose behalf the union was *obliged* to perform its *statutory functions*, but who refused to contribute to the cost *thereof*." *Ellis*, 466 U.S. at 447 (emphasis added); *accord Keller*,

110 S. Ct. at 2235. Those functions are not "self-generated," as Respondents' Brief at 12 n.7 pretends. They are imposed by the statute which grants the union its status as exclusive representative, explicitly as to "the mutual obligation of the employer and the representative of the employees" to engage in collective bargaining, contract administration, and grievance adjustment, Mich. Comp. Laws § 423.215 (1979) (P.A. 93a), and implicitly as to the duty of fair representation in that process, *Goolsby v. City of Detroit*, 419 Mich. 651, 660 & n.5, 358 N.W.2d 856, 861 & n.5 (1984). *See Abood*, 431 U.S. at 221-22. In short, the "free rider" rationale applies only to the statutorily-defined process which a nonmember has a legally enforceable right to have his bargaining agent perform on his behalf.

III. CHARGING FOR SERVICES ON A STATE AND NATIONAL BASIS IS NOT A NARROWLY TAILORED MEANS OF SUBSIDIZING A STATUTORY SCHEME OF BARGAINING SEPARATELY WITHIN SINGLE UNITS

The unions misrepresent *Ellis* on the issue of where objectors' fees may be spent. *Ellis* did not reject the contention that objectors can be compelled to contribute no more than a pro rata share of the costs of statutory exclusive representation of their own bargaining unit. It *adopted* that standard, recognizing that those costs include "not only the direct costs of negotiating and administering *a* collective-bargaining contract and of settling grievances and disputes, but also the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees *in the bargaining unit*." 466 U.S. at 448 (emphasis added). As Petitioners' Brief at 19-20 shows, *Ellis* applied this bargaining-unit standard to each activity on which it ruled, including the national union's magazine.[3]

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[3] *Ellis*, 466 U.S. at 450, did not hold that articles on the various topics it listed were chargeable even if concerning only units other than the objectors', as Respondents' Brief at 27 implies. *Ellis*' list is merely descriptive. It includes articles about "proposed or recently enacted legislation," which were not chargeable under the union's rebate policy, *Ellis v. Railway Clerks*, 685 F.2d

[note continued]

Arguing that nonmembers may be charged for services the affiliates of their bargaining agent provide to other bargaining units, but *not* to theirs, so long as the services are chargeable in the others, Respondents' Brief at 16 defines the question as whether the nonmembers' agent "is enabled through that affiliation to more effectively 'implement or effectuate [its] duties as . . . exclusive representative of the employees in the [petitioners'] bargaining unit.'" Addition of the phrase "more effectively" to the quote from *Ellis*, 466 U.S. at 448, confirms that the unions are recycling the argument that it is sufficient if "activities ultimately benefi[t] the union's collective-bargaining efforts." That argument was *rejected* in *Ellis* as not within "the free-rider rationale." *Compare id.* at 441 *with id.* at 448, 451-53.

Respondents' Brief at 24 asserts that no additional infringement on first-amendment interests arises when objectors are charged for services not provided to their bargaining unit, because the "expressive content" is the same as when the services are performed for that unit. That is false, even with regard to statutory exclusive representation.

An objector's bargaining agent deals with his own employer concerning the terms and conditions of employment of *only* employees with whom he shares a state-determined community of interest as to such matters. Bargaining units are not a mere "fortuity," as the AFL-CIO's Brief at 8 n.5 asserts, but are based on standards defined by statute and by administrative agencies which determine what units are appropriate for bargaining purposes. *Compare* Mich. Comp. Laws §§ 423.9e, .213 (1979) (Public Employment Relations Act ("PERA")), *with* 29 U.S.C. § 159(b) (1982) (National Labor Relations Act ("NLRA")) *and* 45 U.S.C. § 152, Ninth (1982) (Railway Labor Act ("RLA")). The agency "does not exercise this authority aimlessly; in defining bargaining units, its focus is on whether the employees share a 'community of interest'" in terms and conditions of employment.

1065, 1069 (9th Cir. 1982), *aff'd in part, rev'd in part*, 466 U.S. 435 (1984). The Court *adopted* and expanded that limit, holding that objecting nonmembers cannot be charged for articles reporting on *any* activities for which they cannot be charged, giving organizing and litigation concerning other units as examples. *Ellis*, 466 U.S. at 450-51 & n.11.

NLRB v. Action Automotive, Inc., 469 U.S. 490, 494 (1985); *accord Board of Regents v. Eastern Mich. Univ. Professors*, 46 Mich. App. 534, 537, 208 N.W.2d 641, 643 (1973); *see also* 9 T. Kheel, *Labor Law* § 50.04[2] (1990) (RLA). "A cohesive unit—one relatively free of conflicts of interest—serves the Act's purpose of effective collective bargaining, and prevents a minority interest group from being submerged in an overly large unit." *Action Automotive*, 469 U.S. at 494 (citations omitted).

In contrast, a union's structure is not determined by governmental interests at all, but by often haphazard, voluntary affiliations which occur "for a variety of reasons," including "'changing economic and political conditions.'" *NLRB v. Financial Inst. Employees*, 475 U.S. 192, 199 n.5 (1986) (quoting Note, *Union Affiliations and Collective Bargaining*, 128 U. Pa. L. Rev. 430, 431 (1979)). Affiliation is an internal union matter which "'does not directly involve the employment relation.'" *Id.* at 203 n.10 (quoting *Amoco Prod. Co.*, 239 N.L.R.B. 1195, 1195 (1979)). Indeed, the NLRA declares that the extent of union organization "shall not be controlling" in determining an appropriate bargaining unit. 29 U.S.C. § 159(c)(5) (1982); *see also Hotel Olds v. Labor Mediation Bd.*, 333 Mich. 382, 53 N.W.2d 302 (1952) (setting aside a unit re-determination made to conform to a changed union structure).

Unlike the bargaining unit, affiliation does not ensure a community of interest. Many national unions serve employees in more than one industry or occupation and in both the public and private sectors.[4] There is a "steady trend toward" a smaller number of larger internationals serving employees in "diverse parts of the economy." R. Freeman & J. Medoff, *What Do Unions Do?* 35-36 (1984).[5] Respondent Michigan ("MEA") and

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[4] Examples of unions involved in both sectors are the Service Employees, Teamsters, Communications Workers, Autoworkers, and Steelworkers. Troy, *Will A More Interventionist NLRA Revive Organized Labor?*, 13 Harv. J.L. & Pub. Pol'y 583, 628 (1990).

[5] *E.g.*, in 1974, about two-thirds of the members of the Steelworkers worked outside of steel, in twenty-eight different industries; the Autoworkers had members in twenty industries, the Machinists in eighteen, and the Teamsters in

[note continued]

National ("NEA") Education Associations are such "conglomerates," with locals of not only faculty in higher education, but also teachers in public elementary through high schools, educators in private and parochial schools, school secretaries, and school nurses. *See* Petitioners' Brief at 3-4.

Diversification may or may not provide economies of scale—a claim for which there is no evidence in the record—but does generate conflicts of interest:

> Occupational differences may * * * cause increasing strains and political factionalism within the union. More important still, it may be difficult for the union to provide effective service for a wide variety of occupations. Employees in different industries and trades have widely differing needs and problems. The law, regulations, and employment problems of government employees differ profoundly from those of workers in the private sector * * *. The needs and desires of white-collar workers are very different from those of manual workers.

D. Bok & J. Dunlop, *Labor and the American Community* 156-57 (1970).[6] The record here shows divergent interests with regard to bargaining among the different types of employees represented under the PERA by locals of the MEA and NEA. *See* Petitioners' Brief at 22. Other differences arise because some locals represent employees under statutes other than the PERA, in the

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eleven. "The Teamsters' efforts to organize any and all workers regardless of activities is indicative of the changed views of many * * * unions with respect to jurisdiction." Freeman & Medoff, *supra*, at 36. "There remain only a handful of national unions whose entire memberships fall within their original jurisdictions or are reflected in their union names"; "it is not unusual to find them representing workers in unrelated industries * * *." J. Wallihan, *Union Government and Organization in the United States* 66-67 (1985).

[6] Conglomeration can also produce misallocation of resources and excess bureaucracy. *See* Lewellen, *A Pure Financial Rationale for the Conglomerate Merger*, 26 J. of Fin. 521, 534 (1971); Windmuller, *Concentration Trends in Union Structure: An International Comparison*, 35 Indus. & Lab. Rel. Rev. 43, 56 (1981).

private sector or other states, which define the subjects of bargaining differently and permit strikes. Moreover, in the public sector there is necessarily a conflict of interests among bargaining units even when the type of employee is the same, because the employers are in unavoidable competition for scarce public resources.

Thus, a significant difference in the "expressive content" of bargaining and contract administration exists when an objector is coerced into association with workers whose interests are insufficiently close to his for the state to include them in his unit.[7] From the objector's perspective, those workers' terms and conditions of employment are matters not of employer-employee relations, but of "industrial relations" and, in the public sector, politics, *i.e.*, matters of public concern on which the objector must be treated as a citizen, not employee, for purposes of the first amendment. *See Pickering v. Board of Educ.*, 391 U.S. 563, 571-74 (1968); *Thornhill v. Alabama*, 310 U.S. 88, 102-04 (1940). The "expressive content" of bargaining which affects the objector only as taxpayer, consumer, competitor for public resources, and/or parent differs radically from that which affects him primarily as an employee. That difference is greatest as to bargaining on subjects which cannot be bargained in his unit due to differences in the types of employees or the statutes under which they bargain.

Moreover, the unions refuse to acknowledge that not just contract negotiation and administration in other units, but other activities which undeniably implicate core first-amendment interests, increase the constitutional infringement if the bargaining-unit standard is not used. Litigation not concerning the Ferris State College unit and reports in the MEA's publication about organizing were held chargeable below, in direct conflict with *Ellis*, 466 U.S. at 451-53. *See* P.A. 55a-57a, 80a; Petitioners'

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[7] *In the case of workers in other states, this is association which Michigan has absolutely no authority to compel* even if it perceived a community of interest. Michigan clearly cannot constitutionally create multi-state bargaining units, and it may not reach that result indirectly by requiring multi-state financing of bargaining. "What the First Amendment precludes the government from commanding directly, it also precludes the government from accomplishing indirectly." *Rutan v. Republican Party*, 110 S. Ct. 2729, 2738-39 (1990).

Brief at 17-18 & n.9.[8] Also held chargeable were lobbying, ballot campaigns and other politics, publicity, and professional activities on matters related to bargaining at Ferris only indirectly or, in such cases as property-tax legislation and millages, *not at all*. *See* Petitioners' Brief at 17-18, 25-39.

That unions "normally" operate by preference on a cost-sharing basis is no compelling reason for permitting this broad denial of first-amendment rights. "'[I]f the age [and extent] of a pernicious practice were a sufficient reason for its continued acceptance, the constitutional attack on racial discrimination would, of course, have been doomed to failure.'" *Elrod v. Burns*, 427 U.S. 347, 369 n.22 (1976) (quoting *Illinois State Employees Union v. Lewis*, 473 F.2d 561, 568 n.14 (7th Cir. 1972), *cert. denied*, 410 U.S. 928 (1973)).

Affiliation is not analogous to an insurance policy or membership in an organization that guarantees specified services on demand for a flat rate, as the unions claim. Those are contracts in which one party, for consideration, agrees to pay money or provide specified services to another on a specified contingency. *See* 43 Am. Jur. 2d *Insurance* § 1 (1982). The Ferris Faculty Association ("FFA") has no legally enforceable agreements with the MEA and NEA *guaranteeing* additional services when the FFA has extra bargaining or grievance-adjustment needs.

Nor does the fee payor have a legal right to any services from the MEA and NEA. His only enforceable claim—and the only one that justifies a fee—is to fair representation in bargaining and contract administration. That statutory right is enforceable *only* against his exclusive representative, the FFA; the parent affiliates of an exclusive representative have no duty of fair representation. *See Teamsters Local 30 v. Helms Express*, 591

[8] Respondents' Brief at 28 n.25 quibbles that Petitioners' Brief at 20 said that organizing was held chargeable. That statement was cross-referenced to Petitioners' Brief at 17-18 & n.9, which detailed how reports in the MEA's publication about organizing were held chargeable. The contentions in Respondents' Brief at 27 n.25 that *Ellis*' holdings with regard to organizing and litigation are irrelevant here are rebutted in Petitioners' Brief at 19-21 and *supra* pp. 2-3.

F.2d 211, 217 (3d Cir.), *cert. denied*, 444 U.S. 837 (1979); *Sinyard v. Foote & Davies Div.*, 577 F.2d 943, 947-48 (5th Cir. 1978).

Moreover, insurance premiums and similar fees do not include costs of services which the payor can never use or which are received by individuals who pay no fee. MEA and NEA dues include the costs of services which *can never* be provided to the FFA, because other locals represent different types of employees and/or operate under different bargaining statutes. They also include the costs of services for employees who pay *no* fee, because even in Michigan not all locals have an agency shop, *see* J.A. 144 (J.A. 51-52), and the NEA has locals in states which prohibit it. Also, insurance rates and the like are higher for groups with a history or statistical probability of greater demand for services. The unions' flat rate affiliation fees do not reflect the reality that some locals always need more assistance from the MEA and NEA than others, due to different economic and/or statutory considerations.

The facts here graphically expose the speciousness of the "insurance" argument. The MEA and NEA did not prove that they *ever* delivered bargaining-related services to the Ferris unit that cost more than the dues and fees received from it. Indeed, although the FFA was involved in difficult contract negotiations in the year at issue, P.A. 29a-30a, the unions introduced no evidence of "catastrophic costs" underwritten that year by the MEA or NEA!

Possible economies of scale also supply no compelling reason to charge dissenters more than a fair share of the *actual* costs of chargeable services provided to *their own* unit. Mergers and integration do not change the principles of cost accounting. Corporations still charge different prices, based on actual costs, to customers who receive different types or quantities of services and products; they do not charge customers for services and products not received. Conglomeration merely increases the number of customers, services, and products among which a corporation or union can legitimately allocate its general *administrative* costs, and the number of customers among whom it can allocate other costs *common* to a *particular* service or product.

Allocation by bargaining unit "to charge nonmembers only for those activities that *actually* benefit them," *Communications Workers v. Beck*, 487 U.S. 735, 760 (1988) (emphasis added), is

not impossible, as the unions complain. Cost analysis procedures enable non-profit organizations to determine, and base fair charges on, the full direct and indirect costs of specific services provided to clients in individual service units. *See* R. Vinter & R. Kish, *Budgeting for Not-for-Profit Organizations* 225-305, 334-47 (1984). The MEA and NEA already record some costs by unit or group of units served. *See* Petitioners' Brief at 23-24. Both are multi-million dollar operations, P.A. 36a, 40a, with sophisticated, computerized accounting systems which could be adapted to do such allocations. *See* Pl.Ex. 133 (Trial Transcripts, Anderson at 67-70, 79-81, Vol. IV at 649).[9] Therefore, the state interests accepted by this Court as justifying the agency shop can be achieved by means significantly less restrictive of first-amendment freedoms than that approved below.

IV. THE STATE CANNOT COMPEL NONMEMBERS TO PAY FOR REPRESENTATION ON POLITICAL AND IDEOLOGICAL MATTERS OUTSIDE THE BARGAINING PROCESS EVEN IF THE SUBJECT AFFECTS EMPLOYMENT CONDITIONS

As shown in Petitioners' Brief at 13-14, the only duties which the PERA, like the federal labor statutes, imposes on an exclusive representative are fairly to represent all employees in a bargaining unit in negotiating and administering a collective agreement with their employer and in adjusting grievances arising under it. *Compare Abood*, 431 U.S. at 221-22 *with id.* at 223-24. The unions point to no provision of the PERA obliging a bargaining agent to engage in (or hold conventions or publish reports concerning) lobbying, ballot campaigns and other electoral politics, public relations, and professional activities which are not "an *integral* part of th[at] bargaining process," *id.* at 236 (emphasis added), but instead merely affect it or concern terms and conditions of employment in some other way.[10]

Respondents' Brief at 29-30 claims that those non-bargaining activities "relate" to bargaining sufficiently to justify coerced subsidies, because "labor's cause often is advanced on fronts other than collective bargaining and grievance settlement within the immediate employment context," including through "appeals to legislators." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565-66 (1978). But whether "labor's cause" is advanced is irrelevant in determining what activities may be charged to nonmembers, as *Eastex* recognized. Lobbying is a protected concerted activity, but the statute, in the case of the NLRA and RLA, or the Constitution, in this case, limits its funding to voluntary dues. *See id.* at 566 n.16 (citing *Machinists v. Street*, 367 U.S. 740 (1961), and *Abood*). If the test were whether an activity advances "labor's cause," not only lobbying affecting working conditions, but candidate support, ideological litigation, and organizing would be

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[9] This would not require *absolute* precision. *See Hudson*, 475 U.S. at 307 n.18. Nonetheless, " '[p]recision of regulation must be the touchstone' in the First Amendment context." *Id.* at 303 n.11 (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)).

[10] The Brief for Amicus New Jersey Unions also identifies no provision of that state's Employer-Employee Relations Act, N.J. Stat. Ann. §§ 34:13A-1 to -29 (West 1988 & Supp. 1990), nor any decision construing it and article I, paragraph 19 of the New Jersey Constitution, which makes a union *exclusive representative* for other than collective negotiations, contract administration, and grievance adjustment with the employer of the employees for whom it is that agent. *See Lullo v. Fire Fighters Local 1066*, 55 N.J. 409, 262 A.2d 681 (1970); N.J. Stat. Ann. § 34:13A-5.3 (West 1988). Exclusive representation in New Jersey includes the "interpretation, application or claimed violation" *within the unit* of statutes and regulations "which directly and intimately impact upon the terms and conditions" of employment in it, but does not extend to the employer's determination of governmental policy which the legislature has excluded from collective negotiations: "with respect to the presentation of public employees' views to their governmental employers on matters not directly pertaining to the employment relationship, there would seem to be no justification for treating public employees any differently than citizens who are not employed by government." *Township of West Windsor v. PERC*, 78 N.J. 98, 113-16, 393 A.2d 255, 262-64 (1978). Because "public employees' special access to government applies only where the government is acting in the capacity of an employer, and not where it is acting in its capacity as public policymaker," *Ridgefield Park Educ. Ass'n v. Ridgefield Park Bd. of Educ.*, 78 N.J. 144, 163, 393 A.2d 278, 287 (1978), exclusive representation *a fortiori* also does not extend to the adoption of statutes and regulations by governmental bodies other than the employer.

constitutionally chargeable, which *Street*, *Abood*, and *Ellis* together deny.

That the state has *excluded from collective bargaining*, and left to the voters, legislature, executive branch, or market place of ideas, certain decisions setting or affecting terms and conditions of employment is no compelling reason for coercively subsidizing union efforts to influence those decisions, as the unions argue.[11] To the contrary, it proves that the state has no valid reason for such coercion.

Public-sector collective bargaining "is a special political process for making governmental decisions. It sets aside normal political processes and gives the union, as representative of the

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[11] *That situation is not unique to the public sector:*

> Congress and the state legislatures have imposed a number of terms and conditions on private industry to regulate the employment relationship and the operation of the work-place. These include [statutes] which regulate general conditions in employment, [statutes] which apply to a particular industry or class of employees, and a wide variety of state tort and worker's compensation laws. These statutes often represent the minimum standards under which employees may labor in this society and generally may not be altered in a collective bargaining agreement.

EEOC v. County of Calumet, 686 F.2d 1249, 1255 n.4 (7th Cir. 1982) (citations omitted); *accord Mine Workers Health & Retirement Funds v. Robinson*, 455 U.S. 562, 575 (1982).

In *Street*, 367 U.S. at 800-03, 811-18, Justice Frankfurter argued in dissent, like the unions here, that "the practical necessity for unions" to lobby to improve terms and conditions of employment by statute brought lobbying within the "free-rider" rationale. To avoid first-amendment "questions of the utmost gravity," *id.* at 748-50, the Court *rejected* that argument. It held that only "participation in the machinery of the Act" is within the "free-rider" rationale, and not lobbying and other union political activities. *Id.* at 761, 768-70 & n.17. That unions "must" "turn to the legislative arena • • • to further the interests of workers" was urged again in *Communications Workers v. Beck*, 487 U.S. 735 (1988). Brief for Petitioners at 46-47, *Beck* (No. 86-637). The Court rejected the argument again: in both the NLRA and RLA "Congress authorized compulsory unionism only to the extent necessary to ensure that those who enjoy union-*negotiated* benefits contribute to their costs." *Beck*, 487 U.S. at 746 (emphasis added). The judgment that "lobbying" was "indisputably *unrelated* to bargaining unit representation" was affirmed. *Id.* at 740-42 (emphasis added).

employees, a more effective voice in decisions" and "restricts the public's participation." It thus "should extend no further than the reasons which justify its creation." Summers, *Bargaining In The Government's Business: Principles And Politics*, 18 U. Tol. L. Rev. 265, 272, 274 (1987). When the state decides that decisions should be made not through bargaining, but through normal political or ideological processes, by definition it determines that unions should not have the greater voice of an exclusive representative in those decisions, but only the voice that they have as voluntary associations of citizens. It thus serves no rational, much less compelling, state interest to require nonmembers to give unions the increased voice that comes with a larger treasury.[12]

Indeed, the first amendment would not permit a state to make a bargaining agent the exclusive representative of all public employees in its unit for purposes of speaking to the voters, legislature, or executive branch on decisions that the state leaves to the normal political processes of ballot propositions, legislation, and regulation, or even for speaking publicly on matters subject to bargaining, because "participation in public discussion of public business cannot be confined to one category of interested individuals. To permit one side of a debatable public question to have a monopoly in expressing its views to the government is the antithesis of constitutional guarantees." *Madison Joint School Dist. v. WERC*, 429 U.S. 167, 175-76 (1976) (footnote omitted). And, if the state cannot silence employees who oppose their bargaining agent's positions in the normal political processes, or in a public forum on a matter subject to bargaining, it cannot

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[12] If there is a compelling governmental interest *against* political use of corporate wealth amassed in part due to "the unique state-conferred corporate structure," there can be no compelling governmental interest *supporting* political use of large union treasuries amassed due to "the significant state-conferred advantages," *Austin v. Michigan Chamber of Commerce*, 110 S. Ct. 1391, 1397-98, 1400 (1990), of exclusive representation and agency shops. Indeed, paraphrasing Justice Brennan's concurring opinion in *Austin*, 110 S. Ct. at 1405-06, because of the state action inherent in the public-sector agency shop (as to which there is no corporate equivalent), the state has a "constitutional *duty* to protect the objecting" nonmember by "preventing a [union] it has [made exclusive representative] from exploiting those who do not wish to contribute to the [union's] political message."

accomplish the same result by requiring them to provide funds with which it drowns out their attempts at speech.[13]

Respondents' Brief at 39 argues that "the subject matter—and accordingly the degree of infringement of first-amendment rights—remains the same," whether the decisions which unions seek to influence with nonmembers' funds are made "at the bargaining table" or elsewhere, because those decisions all concern "terms and conditions of employment" and the forum is irrelevant. That is absurd on its face, because if all decisions affecting terms and conditions of employment were fungible, the state and federal governments would not have concluded that some are subject to bargaining and others "belong to the public and cannot be removed from the normal political processes," Summers, *supra* p. 15, at 274.

Moreover, the union's argument is contrary to this Court's decisions in *Pickering*, *Madison Joint School District*, and cases distinguishing "commercial" speech from other speech, all of which the unions ignore. *Pickering*, 391 U.S. at 568, 571-74, held that a teacher's public statements criticizing a proposed local tax increase to fund his school system were not a matter of employer-employee relations, on which the state's interests as employer

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[13] *Keller* does not establish that, as the Brief for Amicus New Jersey Unions at 5 says, "there is *no* constitutional barrier to a state's decision that members of a certain occupational group must financially support an association charged with advising the state on the regulations governing the occupation." Lawyers may be compelled to subsidize "the cost of the professional involvement" of the bar in "the regulation of the profession," because of their "*unique* status of being among those admitted to practice before the courts." *Keller*, 110 S. Ct. at 2235 (emphasis added).

Public employees have no such unique status: "[p]ublic employees are not basically different from private employees." *Abood*, 431 U.S. at 229. For public employees, the analog to "regulation of [the profession]" is not lobbying, it is "union negotiation with their employer." *Keller*, 110 S. Ct. at 2235. Moreover, when a public employee union lobbies it does not "provide specialized professional advice," *id.*, it acts as "an organized group playing an active role in the process much the same as other interest groups." Summers, *Public Employee Bargaining: A Political Perspective*, 83 Yale L.J. 1156, 1163 (1974); *see* M. Lieberman, *Public-Sector Bargaining* 162 (1980) ("the public-sector union is a hybrid union-political party"); Vieira, *Are Public-Sector Unions Special Interest Political Parties?*, 27 DePaul L. Rev. 293 (1978).

would be more significant, but "debate on matters of public importance," on which "it is necessary to regard the teacher as [a] member of the general public," fully protected by the first amendment.[14] In *Madison Joint School District*, the state restrained a teacher's speech on a subject of current bargaining. The Court held that the speech was fully protected by the first amendment, *precisely because it was made at a public meeting*, not at a negotiating session between the union and employer. 429 U.S. at 175-76 & n.10.

The forum—more precisely, the process—also is determinative in the cases recognizing that when government regulates lobbying and other direct public advocacy of ideas—including ideas related to the business interests of the speaker—the infringement on first-amendment rights is greater than when purely "commercial" speech is regulated. *See, e.g., Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 561-63 & n.5 (1980); *see also Eastern R.R. Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127, 135-41 (1961) (an anti-trust law must apply only to "private action," not lobbying to obtain "a law that would produce a restraint [of trade] or monopoly," because lobbying is protected by the first amendment). That distinction is implicit in *Abood* and *Ellis*, *see Roberts v. United States Jaycees*, 468 U.S. 609, 637-38 (1984) (O'Connor, J., concurring), as some of the unions' concessions as to what is nonchargeable implicitly acknowledge.

Purely "commercial" speech is "speech that proposes a commercial transaction." *Board of Trustees v. Fox*, 109 S. Ct. 3028, 3036 (1989) (emphasis omitted). When a bargaining agent negotiates a medical benefits plan which funds abortions, or seeks a clause in the collective agreement proscribing racial discrimination, those are "commercial" transactions, and their costs are chargeable to employees who oppose abortion or object to the nondiscrimination clause. *See Abood*, 431 U.S. at 222. But, when that union lobbies a legislature to fund abortions or pass legislation prohibiting discrimination in the workplace, it is engaged in

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[14] Significantly, the teacher's statements were in response to public statements by both the school board and *teachers' union* supporting the tax increase. *Pickering*, 391 U.S. at 566.

"the expression of political views * * * [and] the advancement of other ideological causes not germane to its duties as collective-bargaining representative," *id.* at 235, and the costs are not chargeable, *as Respondents' Brief at 38 concedes.*

The same distinction applies to all activities at issue here, even accepting the unions' mischaracterization of them.[15] Negotiation or administration of a contract provision setting wages, or retirement benefits, or the criteria for evaluating teachers is a "commercial" transaction, the costs of which are chargeable to nonmembers. Lobbying for legislation funding public education or regulating the retirement system for public employees; campaigning on ballot issues affecting the funding of public education; public relations "efforts to galvanize community support for the unions and for public education," Respondents' Brief at 43;[16] and the development and advocacy of "instructional methods and other professional skills," *id.* at 45,[17] are political or ideological activities, not "an integral part of the bargaining process," *Abood*, 431 U.S. at 236. *See Pickering*, 391 U.S. at 571-74. Their costs thus are not constitutionally chargeable to objecting nonmembers.

[15] On first-amendment issues, this Court does not defer to findings of lower courts, but examines the entire record anew. *Rankin v. McPherson*, 483 U.S. 378, 384-86 & n.9 (1987). As Petitioners' Brief at 25-26, 32-33, shows with specific record references to *evidence*, the lobbying and politics at issue here in fact are much broader than the unions, relying on selective quotation from the decisions below (and ignoring Judge Merritt's dissent), claim. Also, while it accuses petitioners of selectively excerpting the record to show that the MEA and NEA conventions and 13E Coordinating Council served primarily political and ideological purposes, the excerpts cited in Respondents' Brief at 47 n.47 are more selective and less revealing of the conventions' and Council's actual activities than the contemporaneous union documents cited in Petitioners' Brief at 39.

[16] Public relations designed to improve the overall image of a union is, like organizing, "proselytizing on behalf of the union, not engaging in representation of employees for bargaining purposes," AFL-CIO Brief at 29 n.19. Public relations on behalf of education generally is part of the normal political processes, since public education's funding through legislation and millages ultimately depends on community support for education. Public relations activities associated with the FFA's negotiations are not part of the bargaining process, but "public discussion of public business" which nonmembers have an "absolute right" not to subsidize. *See Madison Joint School Dist.*, 429 U.S. at 175-76 & n.10.

V. THE STATE HAS NO INTEREST IN COERCED SUBSIDIZATION OF THREATS OF ILLEGAL STRIKES

The unions make two disingenuous arguments for charging the nonmembers the costs of "publicizing, preparing for and threatening a strike that would be illegal under Michigan law." P.A. 11a.

First, they brazenly assert that "Michigan has never declared that it is unlawful, or even contrary to public policy, for a union to threaten an illegal strike." Respondents' Brief at 49. Because first-amendment rights are at stake, the burden of persuasion is not on the nonmembers to show that an activity is against public policy, but on the unions to show the state's compelling interest. *See, e.g., Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530, 540 (1980); *Speiser v. Randall*, 357 U.S. 513, 525-26 (1958). No state has an interest in coerced financing of threats of illegal acts. Moreover, Michigan *has* declared it against public policy to compel nonmembers to contribute to a fund collected in anticipation of public-sector strikes. *Male v. Grand Rapids Educ. Ass'n*, 98 Mich. App. 742, 749-50, 295 N.W.2d 918, 919-20 (1980), *appeal denied*, 412 Mich. 851 (1981).

Second, the unions claim that the disputed money was not spent solely to threaten or prepare for a strike. Respondents'

[17] Respondents' Brief at 45 n.45 chides petitioners for not citing "any particular articles in the *Teacher's Voice*" to show that the professional activities held chargeable here are ideological in nature. In fact, Petitioners' Brief at 36 referenced a list of titles of all articles in the *Teacher's Voice* in this category. The articles' ideological nature is typified by those on page ten of the October 12, 1981, issue: "'UN Celebrates 36th Year,' 'Big Fall Art Conference,' 'Phys Ed, Health Meeting Nov. 12,' 'Workshop on Alternate Careers Nov. 1,' 'Urban Operation Offers Energy Teaching Help,' 'Electric "Lifeline" Rates for Subsistence, Conservation Go Into Effect'." J.A. 239 (J.A. 24-26). *See Pacific Gas & Elec. v. P.U.C.*, 475 U.S. 1, 8-9 (1986).

Brief at 49. However, the only other purposes the expenditures served were providing a meeting place for members during negotiations and "informing the public of the issues involved in an attempt to bring public pressure to bear on the employer." P.A. 30a. Those purposes were not "plainly chargeable" as Respondents' Brief at 49 asserts. A temporary *strike* headquarters was not needed to hold union meetings; and, public pressure was not significant to the negotiations, because Ferris derives funds from tuition and legislative appropriations, not the local community. *See* J.A. 112. Even assuming that a strike was not intended,[18] the only real purpose for the "crisis center" and public information activities was to make the threat of a strike credible. Moreover, even where strikes are legal, creating a favorable climate of public sympathy and support for the union is "not 'reasonably necessary . . . for the proper effectuation' of collective bargaining." *Beck v. Communications Workers*, 776 F.2d 1187, 1211 n.32 (1985), *aff'd en banc*, 800 F.2d 1280 (4th Cir. 1986), *aff'd on other grounds*, 487 U.S. 735 (1988).

VI. CONCLUSION

The unions and their amici ask this Court both to abandon its traditional first-amendment strict scrutiny and to retreat from its consistent holdings in *Street*, *Abood*, *Ellis*, and *Beck* as to the limits of the state interests that justify the agency shop and the union activities that serve those interests. The Court should reject these siren calls, reverse the decision of the Sixth Circuit, and grant all relief requested in the Brief for Petitioners.

Respectfully submitted,

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[18] That assumption is contrary to the documentary evidence, which consists of *private* communications among union officials, not public statements as Respondents' Brief at 49 n.50 would have the Court believe. *See* Petitioners' Brief at 41 & n.33.